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Supreme Court, U.S.
FILED
NOV 5 1997
CLERK

No. 96-1337

In The

Supreme Court of the United States

October Term, 1997

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, and JAMES EVERETT SMITH,

Petitioners,

vs.

TERI LEWIS and THOMAS LEWIS, Personal Representative of the Estate of PHILIP LEWIS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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I

THE APPROPRIATE LEGAL STANDARD TO ESTABLISH A VIOLATION OF SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT IN A POLICE PURSUIT IS CONDUCT THAT IS "ARBITRARY" OR "SHOCKS THE CONSCIENCE."

In relying on a dissenting opinion in a court of appeals case, respondents assert incorrectly that this court's analysis in *Collins v. Harker Heights, Tex.*, 503 U.S. 115 (1992) in determining whether conduct was sufficiently "arbitrary" or "conscience shocking" so as to give rise to a violation of substantive due process is at best dicta. See Brief for Respondents, 24-25, citing *Fagan v. City of Vineland*, 22 F.3d 1296, 1311-12 (3rd Cir. 1994) (en banc) (Cowen, J., dissenting). In *Collins*, it was necessary for this court to identify the appropriate legal standard to be applied to a claim for an alleged violation of substantive due process in order to determine whether the facts of that particular case were sufficient to meet that standard. *Collins*, at 126-130. Moreover, respondents have failed to cite any opinion rendered by this court which would support the proposition that the legal standard to determine a violation of substantive due process should be either "reckless disregard" or "deliberate indifference." Thus, respondents have failed to establish why the legal standard applied to a claim for an alleged violation of substantive due process by this court in *Collins* should not be the appropriate legal standard to be applied in this case.

Respondents also assert that this court suggested that "deliberate indifference" on the part of a government official would be sufficient to invoke protection under the

Fourteenth Amendment. Brief for Respondents, p. 11. Respondents erroneously rely upon the reference to *Curtis v. Everett*, 489 F.2d 516 (3rd Cir. 1973), *cert. denied, sub nom., Smith v. Curtis*, 416 U.S. 995 (1974) and *Davidson v. Cannon*, 474 U.S. 344, 348 (1986). In that reference, this court was merely comparing a claim for negligence with other conduct that may give rise to a claim for violation of substantive due process. *Id.* The reference does not suggest that deliberate indifference would be sufficient to establish a violation of substantive due process. Rather, both *Curtis v. Everett*, and the other case relied upon by this court for making that comparison, *Johnson v. Glick*, 481 F.2d 1028 (2nd Cir. 1973), *cert. denied, sub nom., John v. Johnson*, 414 U.S. 1033 (1973), are cases in which the Third Circuit Court of Appeals applied the "shocks the conscience" test in relation to alleged violations of substantive due process. *Curtis v. Everett*, 489 F.2d at 518-519; *Johnson v. Glick*, 481 F.2d at 1032-1033. Furthermore, this court subsequently adopted the definition of the "shocks the conscience" standard developed by Circuit Judge Friendly as the standard for a claim under the Eighth Amendment involving forceful prison security measures, which was then equated with a claim under the Fourteenth Amendment. *Whitley v. Albers*, 475 U.S. at 320-321, 327 (1986).

Respondents maintain that the decision by the Ninth Circuit Court of Appeals in this case should be affirmed since the legal standard of "reckless disregard" or "deliberate indifference" is sufficient to satisfy any intent requirement necessary to establish a violation of the substantive component of the Fourteenth Amendment. Respondents' position is untenable for several reasons.

First, the definition of "reckless disregard" or "deliberate indifference" is not the issue presented to this court. Compare *Farmer v. Brennan*, 511 U.S. 825 (1994). Specifically, the question presented is whether the Ninth Circuit's decision adopting the "deliberate indifference" standard correctly relied upon *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989). In *Canton*, this court held that "deliberate indifference" is sufficient to establish liability against a municipality. *Id.* at 389-390. The legal standard established in *Canton*, however, is objective "deliberate indifference." *Farmer v. Brennan*, 511 U.S. at ___, 114 S.Ct. at 1981. In their Brief, respondents take the position that a reckless intent standard would satisfy any intent requirement of the Fourteenth Amendment. Respondents have failed to distinguish, however, between objective and subjective recklessness as the test for "deliberate indifference." *Id.* Instead, respondents have merely asserted that the test for "deliberate indifference" should be subjective or criminal recklessness. See Brief for Respondents, pp. 12-14 and fn. 7 and 8, relying upon, inter alia, *Medina v. City and County of Denver*, 960 F.2d 493, 496 (10th Cir. 1992), *Archuleta v. McShan*, 897 F.2d 495, 499 (10th Cir. 1990) and Model Penal Code § 2.02(c). In relying upon subjective recklessness to support "deliberate indifference," respondents have essentially conceded that the Ninth Circuit's reliance upon the objective "deliberate indifference" standard set forth in *Canton v. Harris*, is incorrect. Thus, while respondents are requesting that the Ninth Circuit Court of Appeal decision in this case be affirmed, they are doing so by requesting a reckless intent standard with a "heightened degree of mental culpability" that was not adopted by the Court of Appeal in

the *Lewis* decision. Brief for Respondents, p. 16. Therefore, respondents have implicitly conceded that the decision by the Ninth Circuit Court of Appeal should be reversed in this case because it did not apply the appropriate legal standard, as defined by respondents, to a claim for an alleged violation of substantive due process.

Second, assuming respondents have now conceded that the minimum conduct necessary to establish a violation of substantive due process is subjective or criminal recklessness, then the issue before this court is whether claims for alleged violations of substantive due process involving police pursuits should be governed by that standard, which this court has adopted with respect to claims involving conditions of confinement under the Eighth Amendment, *Farmer v. Brennan, supra,* or the legal standard of "arbitrary" or "shocks the conscience" as set forth in *Collins*. As indicated above, this court has equated the "shocks the conscience" standard under the Fourteenth Amendment with conduct that is "malicious and sadistic for the very purpose of causing harm" in connection with forceful prison security measures in a claim under the Eighth Amendment. *Whitley v. Albers, supra; Hudson v. McMillan,* 503 U.S. 1 (1992) (allegations of excessive force by prison officials also governed by malicious and sadistic standard). Thus, by analogy to claims under the Eighth Amendment, the issue is whether the governmental interests at stake in a police pursuit case more closely resemble the use of force by prison officials or conditions of confinement.

Respondents have failed to establish why the governmental interests at stake in a police pursuit are not more closely akin to the use of force by prison officials than the

interests involving conditions of confinement. As a practical matter, police pursuits may have even more compelling reasons for application of a more stringent standard than the interests at stake with respect to use of force in a prison. Decisions made by peace officers in the field regarding the initiation and determination of whether to continue a pursuit are made in dynamic circumstances under intense pressure. Peace officers involved in pursuits of fleeing suspects must, under rapidly evolving circumstances, consider whether the seriousness of the offense warrants a chase at speeds in excess of the posted limit, whether there are any alternative means of apprehending that suspect, whether the pursuit presents unreasonable hazards to other persons or property, which necessarily involve assessments of other vehicle traffic, pedestrian traffic, location of the pursuit, road conditions, weather conditions, visibility or other possible known or unknown road hazards. These factors are even more demanding on an officer where the fleeing suspect has virtually unfettered control over the speed, duration and location of the pursuit. Similar to the forceful prison security measures analyzed in *Whitley*, this court should be hesitant to second guess decisions made by peace officers engaged in police pursuits. Law enforcement agencies also need sufficient latitude to develop appropriate policies and procedures for a given locale to assure an appropriate balance between effective apprehension of suspects and safety of the community. To adopt the less stringent standard of subjective recklessness would effectively remove governing of police pursuits "outside the arena of public debate and legislative action." *Washington v. Glucksberg,* 117 S.Ct. 2258, 2267-2268 (1997).

By comparison, situations involving conditions of confinement are arguably undertaken with a much greater opportunity for reflection on the part of the official who has a duty to provide humane conditions and safety for inmates. In addition, the responsibility to provide proper conditions of confinement does not conflict with the type of competing administrative concerns involved in police pursuits, such as the apprehension of fleeing criminals and the potential that if constitutional restraints are placed on pursuits, it may encourage fleeing suspects to go faster and increase the level of risk so as to avoid capture by an officer who is forced to discontinue the pursuit.

The policy reasons why this court should adopt the more stringent standard of the "arbitrary" or "shocks the conscience" were recently reiterated by Circuit Judge Easterbrook in *Mays v. City of St. Louis*, 123 F.3d 999 (7th Cir. 1997).[1] In *Mays*, the Seventh Circuit acknowledged the difficulties faced by peace officers engaged in pursuits in relation to the potential risk as follows: "Political society must consider not only the risks to passengers, pedestrians, and other drivers that high speed chases

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[1] In *Mays*, the Seventh Circuit expressly rejected expanding claims for alleged violations of substantive due process under the Fourteenth Amendment to cases involving police pursuits that do not otherwise fall within the framework of the Fourth Amendment. But see, *Hill v. Shobe*, 93 F.3d 418 (7th Cir. 1996). Thus, contrary to the position taken by respondents in footnote 11 at page 22 of the Brief for Respondents, there is case law which specifically holds that regardless of the level of culpability, a government official's alleged deprivation of life or liberty in the context of a police pursuit does not implicate the Fourteenth Amendment.

engender, but also the fact that if police are forbidden to pursue, then many more suspects will flee – and successful flights not only reduce the number of crimes solved, but also create their own risks for passengers and bystanders." *Mays*, 123 F.3d at ___, 1997 U.S. App. LEXIS 22826, at *12. Thus, it is quite clear that the governmental interests at stake in police pursuits more closely resemble the governmental interests in the use of force by prison officials. Therefore, reversal of the decision by the Ninth Circuit is necessary and proper to recognize the governmental interests in police pursuits by applying the "arbitrary" or "shocks the conscience" standard to police pursuit cases.

Respondents contend that a "shocks the conscience" standard is ambiguous and unworkable. The issue regarding the definition of the legal standard of "arbitrary" or "shocks the conscience" has not been presented for review. To the extent the question of whether that legal standard should be applied to a claim involving violation of the Fourteenth Amendment in a police pursuit case necessarily calls the definition of that standard into question, it most certainly has both utility and continued vitality. In determining whether conduct "shocks the conscience," this court has used a definition including conduct which is brutal and offensive to human dignity. *Rochin v. California*, 342 U.S. 165, 174 (1952). Perhaps the day has come to formally adopt the definition expressed by Judge Friendly in *Johnson v. Glick, supra*. Requiring conduct that is malicious and sadistic for the very purpose of causing harm would clearly satisfy the need for

deprivations of life, liberty or property under the Fourteenth Amendment to be deliberate and intentional. Nevertheless, the legal standard of "arbitrary" or "shocks the conscience" has been a workable standard since *Rochin v. California*, and is readily demonstrated by the ability of the recent decisions by the Courts of Appeal in applying that standard to police pursuit cases. See Petitioners' Brief on the Merits, pp. 17-20, 30-31.

Respondents also argue that legal standard of "reckless disregard" or "deliberate indifference" would sufficiently limit the scope of cognizable due process violations. Petitioners submit that using subjective recklessness as the test for "deliberate indifference" will substantially increase litigation involving claims for violation of substantive due process in police pursuit cases. This is once again due to the fact that police pursuits inherently involve substantial risks to officers, innocent bystanders and the suspects. In practice, creative pleading will almost always give rise to a question of fact as to whether the facts and circumstances known to the officer during the course of the pursuit were sufficient to find him subjectively reckless in that he should have terminated the pursuit because of a substantial risk of harm to a bystander or the suspect.

The comment to Model Penal Code § 2.02(2)(c) which defines criminal recklessness illustrates this point. In that regard, the comment states as follows:

> "Describing the risk as "substantial" and "unjustifiable" is useful but not sufficient, for these are terms of degree, and the acceptability of a risk in a given case depends on a great many variables. Some standard is needed for determining how substantial and how unjustifiable the risk must be in order to warrant a finding of culpability. *There is no way to state this value judgment that does not beg the question in the last analysis; the point is that the jury must evaluate the actor's conduct and determine whether it should be condemned*. The code proposes, therefore, that this difficulty be accepted frankly, and that the jury be asked to measure the substantiality and unjustifiability of the risk by asking whether its disregard, given the actor's perceptions, involved a gross deviation from the standard of conduct that a law-abiding person in the actor's situation would observe." American Law Institute, Model Penal Code § 2.02, Comment, p. 237 (emphasis added).

Thus, while subjective or criminal recklessness clearly involves a heightened level of mental culpability, whether a peace officer's conduct in a police pursuit is sufficient to constitute criminal recklessness will oftentimes be a question of fact for the jury. *Farmer v. Brennan*, 511 U.S. at ___, 114 S.Ct. at 1989. As a result, in any police pursuit that involves some injury or death, save and except those incidents such as the case at bar that may involve conduct that is at best purely negligent, a jury will be called upon to decide whether the risks outweighed the benefits to determine if there was a gross deviation from a standard of conduct. In actuality, such a standard will call upon a jury to evaluate the reasonableness of an actor's conduct and is therefore merely an extension of negligence. In contrast, the legal standard of "arbitrary" or "shocks the conscience" will allow courts to exercise control over the nature of the claims which may be asserted under the Fourteenth Amendment in the context of police pursuits.

Therefore, based on the manner in which the criminal or subjective reckless standard is to be applied, it seems quite clear that claims for violations of substantive due process arising out of police pursuits will be used to supplant traditional tort laws.

There is one additional policy consideration which, when taken into account, favors application of the "arbitrary" or "shocks the conscience" standard in police pursuit cases. The suspect chooses to flee and it is the suspect who, by reckless driving, creates the danger to society. It is fundamentally unfair and unacceptable to attempt to shift the blame for a suspect's reckless and criminal conduct to a peace officer attempting to perform his sworn duty to apprehend criminals. See *Mays, supra,* at *14-*15. Thus, to adopt a legal standard less stringent than "arbitrary" or "shocks the conscience" would promote the proposition that it is the peace officer who caused the suspect to flee and who creates the danger by continuing the pursuit.

II

NO VIOLATION OF SUBSTANTIVE DUE PROCESS TOOK PLACE IN THIS CASE

Petitioners have requested that once this court determines that the legal standard of conduct necessary to establish a violation of substantive due process under the Fourteenth Amendment in police pursuit cases is "arbitrary" or "shocks the conscience," then this court should also find that no constitutional violation occurred in this case. Respondents have failed to contest that such a finding would be appropriate. Nevertheless, petitioners

respectfully submit that additional clarification of the factual background of this case may assist the court in making that determination. In particular, it is undisputed that Deputy Smith observed Deputy Stapp attempt to stop the motorcycle by turning on the overhead lights of his patrol unit and pulling the patrol car out into the street in an attempt to block the path of the motorcycle. Respondents' expert witness, D.P. Van Blaricom, admits that based on that information, Deputy Smith had the right to stop the motorcycle for failure to yield when requested by another patrol unit to do so. See J.A. at 175-176, 275; Deposition of D.B. Van Blaricom, 60:13-20; California Vehicle Code § 2800.1(a) (which prohibits a suspect from fleeing or eluding a marked patrol unit exhibiting one lighted red lamp and the person sees or reasonably should have seen the lamp). Deputy Smith pursued the motorcycle with red lights and siren and Mr. Willard was aware that he was being pursued by a marked patrol unit with red lights and siren. See Deposition of Willard, 33:3-12; 38:11-16. Deputy Smith did not know the ages or the identities of Mr. Lewis or Mr. Willard. The pursuit took place on rural two lane roads with no curbs or sidewalks with some residences. See Deposition of Smith at 35:16-25; Deposition of Stephenson, 12:1-19; 17:2-8. As Deputy Smith continued the pursuit southbound on Chestnut Avenue prior to or as he approached a crest in the roadway, he did not lose sight of the motorcyclists, but there was a point where he could not see the motorcycle from the seat down. See Deposition of Smith at 50:16-20; 51:4-19; 52:14-28; 53:5-13. This crest or hill in the roadway was not a blind hill over which the officer could not see, but was a small rise in the

road where Deputy Smith momentarily lost sight of the motorcycle but not its occupants. As the motorcycle passed over the crest in the road, it rapidly decelerated in order to make a sharp left turn. Officer Smith, who was approximately three hundred feed behind the motorcycle, observed smoke coming from the rear wheel, immediately applied his brakes but accidentally skidded approximately one hundred-sixty-six feet colliding with the motorcycle and/or Mr. Lewis.

Respondents submit that *Daniels v. Williams*, 474 U.S. 327 (1986) suggests that intentional conduct which interferes with a person's life or liberty constitutes a constitutional violation. Brief for Respondents, pp. 4, 22. Assuming that this court adopts that requirement, then nothing less than intentional conduct would constitute a deprivation of substantive due process. Since respondents have conceded that Deputy Smith did not intentionally hit Lewis or the motorcycle, P.A. 10, then respondents by their own admission are precluded from asserting a claim against Deputy Smith for violation of the Fourteenth Amendment in this case.

Respondents have also failed to establish that in the event this court applies the "arbitrary" or "shocks the conscience" standard in this case, that the conduct of Deputy Smith was sufficiently egregious to raise a question of fact under that standard. Deputy Smith did not act maliciously or sadistically for the very purpose of causing harm to Mr. Lewis, nor did he engage in the pursuit knowing and willing that harm would occur. Rather, this case involves an automobile-motorcycle accident in which the motorcyclist abruptly slowed down or stopped in attempting to negotiate a left turn to make good his

escape and in spite of immediately applying his brakes, Deputy Smith's patrol unit skidded approximately one hundred-sixty-six feet and then collided with Mr. Lewis. Moreover, even assuming arguendo this court were to accept respondents' position that a subjectively reckless definition of deliberate indifference is the appropriate legal standard to be applied to a claim for a violation of substantive due process in a police pursuit case, respondents have failed to establish that there is sufficient evidence to support such a claim in this case. While Deputy Smith's conduct may arguably fall within the classification of negligence, respondents have failed to demonstrate that Deputy Smith had actual knowledge of impending harm but consciously refused to prevent it. See *Hill v. Shobe*, 93 F.3d 421 (7th Cir. 1996). The mere fact that an official may have failed to alleviate a significant risk that he did not perceive is not sufficient to meet that standard. Rather, respondents would be required to show that Deputy Smith was willing to let a fatal collision occur which the record demonstrates did not occur. *Id.*

For each of those reasons, petitioners respectfully submit that this court find that no constitutional violation occurred in this case.

III

THE ISSUES IN THIS CASE ARE PROPERLY PRESENTED FOR REVIEW BY THIS COURT

Respondents argue that petitioners should be estopped from asserting that anything more than reckless conduct is necessary to establish a violation of the Fourteenth Amendment. Essentially, respondents contend that

petitioners failed to assert that the applicable legal standard to establish a violation of the Fourteenth Amendment in this police pursuit case should be "shocks the conscience" before the lower courts. First, such an alleged defect does not affect the jurisdiction of this court. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 383-384 (1989). Second, this court has specifically addressed this issue as follows: "Non- jurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for writ of certiorari; if not, we consider it within our discretion to deem this defect waived." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 384 (1989) citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985); and see Supreme Court Rule 15.2.

The Petition for Certiorari in this case set forth three "Questions Presented." Respondents' present objection is directed to the first question presented.[2] The first question presented both petitioners' request that the appropriate legal standard to establish a violation of substantive due process under the Fourteenth Amendment be "shocks the conscience" and specifically cited *Collins v. City of Harker Heights, Tex.* for that proposition. If respondents sought to raise some form of non-jurisdictional

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[2] The Petition for Writ of Certiorari in this case was granted.

Therefore, all "Questions Presented" are subject to review by this court. Because respondents' objection is only raised with respect to the first question presented for review in the Petition for Writ of Certiorari, petitioners respectfully submit that the second and third "Questions Presented" are properly presented for review without any objection in either Respondents' Brief in Opposition or Brief for Respondents.

defect with the assertion of that issue, they certainly could and should have raised that issue in Respondents' Brief in Opposition so that it could be fully addressed at that time. Respondents failed to raise that objection, or even hint at any such deficiency, however, in their Brief in Opposition to the Petition for Writ of Certiorari. See Respondents' Brief in Opposition. Therefore, respondents failed to raise that objection in a timely manner. On that basis, petitioners respectfully submit that granting certiorari review in this case was proper and any alleged defect should be deemed waived.

Petitioners also respectfully submit that they have steadfastly contested liability in this case. Contrary to the assertion by respondents, petitioners asserted the legal standard of "arbitrary" or "shocks the conscience" in their original Motion for Summary Judgment filed with the District Court. J.A. 38-42. Although petitioners did not cite the *Collins* case in Appellees' Brief in the Ninth Circuit Court of Appeals, the Ninth Circuit was clearly aware of *Collins*, cited *Collins* in its decision in this case, but chose to disregard it. In Appellees' Petition for Rehearing and Suggestions for Rehearing en banc, however, petitioners expressly raised the conflict between the holding by the Ninth Circuit in this case and *Collins*. Petitioners'/appellees' Petition for Rehearing specifically requested further review based on the need to reconcile the deliberate indifference standard adopted by the Ninth Circuit with *Collins* so as to provide a rule of national application and uniformity. See Appellees' Petition for Rehearing and Suggestion for Rehearing en banc at 5-6. Thus, the Ninth Circuit had the opportunity to address *Collins* in context of its limitation on *Canton v. Harris*, and

the applicable legal standard to a claim for violation of due process but declined to do so. Therefore, petitioners sought review of the decision in this case by this court.

Following submission of appellees' Petition for Rehearing and Suggestion for Rehearing en banc, the First Circuit Court of Appeals issued its decision in *Evans v. Avery*, 100 F.3d 1033 (1st Cir. 1996), *cert. denied*, 117 S.Ct. 1693 (1997), *reh'g denied*, 117 S.Ct. 2533 (1997). The impact of the *Evans* decision on petitioners was twofold. First, the decision in *Evans* brought to the forefront the conflict between the Circuit Courts of Appeal regarding the appropriate legal standard to be applied in a police pursuit case for a claim under the Fourteenth Amendment. Second, the First Circuit specifically criticized the decision in *Lewis* for failing to properly analyze the policy considerations of why the "reckless disregard" and "deliberate indifference" standard(s) do not provide an appropriate balance between effective law enforcement and deprivation of the right to substantive due process.

The questions presented which have resulted in plenary review by this court involve far reaching social, political and judicial implications with respect to police pursuits. The scarce judicial resources of this court are well served by resolving the conflicting decisions of the Courts of Appeal and establishing a uniform rule regarding claims for alleged violations of substantive due process in police pursuit cases. Therefore, petitioners respectfully request that this court proceed to rule on the merits of the questions presented.

IV

DEPUTY SMITH IS ENTITLED TO QUALIFIED IMMUNITY

The qualified immunity defense is meant to protect all officers but "the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Qualified immunity is governed by an objective standard, but if reasonably competent officers could disagree on the issue, then the immunity should apply. *Id.*

In support of respondents' position that the Ninth Circuit's decision denying qualified immunity to Deputy Smith should be affirmed, respondents have merely restated the reasoning of the Ninth Circuit in arriving at that holding. Brief for Respondents, pp. 27-35. Respondents fail to demonstrate how those various legal standards would have provided a reasonable officer in the field with settled guidelines of what conduct and/or state of mind would be sufficiently culpable to render him liable for a violation of substantive due process. Although an officer would surely have recognized that the intentional use of a patrol unit to stop a suspect vehicle could potentially be actionable, *Brower v. County of Inyo*, 489 U.S. 593 (1989), a legal standard of "sufficiently egregious" does not provide the type of bright line so that a reasonable official could anticipate when their conduct would violate substantive due process. The difficulty faced by officers in the field in attempting to predict what legal standard may give rise to liability under the Fourteenth Amendment is demonstrated by the need for this court in *Farmer v. Brennan* to clarify the definition of "deliberate indifference" approximately four (4) years after the pursuit in this case in May, 1990. Nevertheless, respondents now

seek to hold Deputy Smith liable under a standard of criminal recklessness which was just one of the myriad of legal standards in conflict in May, 1990, and remain in conflict in this very case. Thus, it cannot be said that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question" in this case. *United States v. Lanier*, 117 S.Ct. 1219, 1227 (1997) citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The recent case of *Mays v. City of East St. Louis, supra*, further illustrates this point. While this case presents the issue of what legal standard should be applied to an alleged violation of substantive due process in a police pursuit case, the Seventh Circuit has determined that an officer involved in a pursuit does not have a duty to prevent injury to passengers by letting criminals escape. *Mays, supra*. at *11. Thus, there not only remains a conflict in the decisional law regarding the appropriate legal standard to be applied, but also the issue of whether there exists a constitutional right in the first instance. If, in fact, qualified immunity is truly designed and meant to protect government officials who are either plainly incompetent or knowingly violate the law, then certainly the absence of the clear constitutional rule, or perhaps the lack of implicating the substantive component of the Due Process Clause in the first instance should shield Deputy Smith from liability in this case. Moreover, reasonably competent officers could obviously disagree on this issue. Therefore, Deputy Smith is entitled to the application of qualified immunity with respect to his involvement in the police pursuit in this case in May, 1990.

Respondents also assert that Deputy Smith is not entitled to qualified immunity because a reasonable officer in his position could not reasonably believe that the conduct involved in the pursuit in this case was lawful. Respondents then attempt to illuminate favorable facts to support their claim. Brief for Respondents, pp. 38-39. Respondents have failed, however, to establish why those facts are demonstrably different from facts and arguments raised in the case law which existed in May, 1990, and had found that officers were not liable. Where, as here, earlier case law has left open the issue of what general rule applies to a particular type of conduct, "a very high degree of prior factual particularity may be necessary." *United States v. Lanier*, 117 S.Ct. 1227 (1997). Based on the facts presented in the record in this case, petitioners respectfully submit reasonably competent officers could disagree whether the undisputed material conduct on the part of Deputy Smith was conduct that violated a clearly established constitutional right as defined by the decisional law available in May, 1990.

Respondents also contend that petitioners conceded that the law was clearly established at the time of the subject incident. Petitioners have asserted the issue of qualified immunity since the outset of this case. Qualified immunity was asserted as an affirmative defense in the Answer to the Complaint and was clearly articulated in the Motion for Summary Judgment brought before the District Court. J.A. at 51. Specifically, petitioners asserted that there was no clearly established constitutional right to be free from police pursuit, that Deputy Smith did not act arbitrarily or brutal so as to shock the conscience and a reasonable officer in his position could have believed

that the police pursuit was lawful in this case. J.A. at 51-52. Here, and as more fully set forth above, respondents have failed to include all of the arguments proffered by petitioners in support of summary judgment and on appeal in this case. Moreover, respondents specifically contested the issue of whether the law regarding violations of substantive due process was clearly established. Appellees' Brief, pp. 13-18. Thus, petitioners have never conceded that the law was clearly established. Rather, petitioners respectfully submit that for all of the reasons set forth in petitioners' Brief on the Merits and as set forth above, Deputy Smith is entitled to qualified immunity for his actions in connection with the police pursuit in this case.

V

CONCLUSION

Based on the foregoing, and for all of the reasons set forth in petitioners' Brief on the Merits, petitioners County of Sacramento, Sacramento County Sheriff's Department and Deputy Smith respectfully request that this court reverse the judgment of the Ninth Circuit Court of Appeals in this case.

Respectfully submitted,

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